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No. 86-885

In The

Supreme Court of the United States

October Term, 1986

BOSTON AND MAINE CORPORATION,

Petitioner,

vs.

R. M. LENFEST, JR., et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

1. Whether the Circuit Court's response to the particular facts of this unprecedented case will undermine the Railway Labor Act.

2. Whether this case presents any conflict of decisions.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ

1. The Court of Appeals' balanced response to the peculiar facts of this unprecedented case will not undermine the Railway Labor Act 2

2. This case does not present any conflict of decisions 7

Conclusion 10

TABLE OF AUTHORITIES

Cases

Boys Market, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970) 9

Gateway Coal Co. v. *United Mine Workers of America*, 414 U.S. 368 (1974) 6

Missouri-Kansas-Texas R.R. v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965) 8

Statutes

Federal Railroad Safety Act, 45 U.S.C. § 441 2,3,4,5,6,7,8,9,10

Legislative History

H.R. Rep. No. 1025, 1980 U.S. Code Cong. & Adm. News 9

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STATEMENT OF THE CASE

Throughout their briefs, the Petitioner Boston and Maine Corporation (B & M or Railroad) and the *amicus curiae* National Railway Labor Conference (*amicus*) accuse the First Circuit Court of Appeals of allowing the Respondents to engage in a "strike." That is a false and misleading characterization of the case. In the words of the First Circuit, "We hold that this was not an illegal strike, but was a protected refusal to work under hazardous

conditions pursuant to §10(b) of the FRSA." (App. 18a).

For an objective statement of the salient facts, the Respondents refer this Court to pages 3a-4a of the Appendix.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' balanced response to the peculiar facts of this unprecedented case will not undermine the Railway Labor Act

The facts of this case are unprecedented. This case arose because of the B & M's failure to provide consistent flagging protection throughout its system. The Respondents are unaware of -- and the B & M and its *amicus* do not cite -- *any* other case involving such a system-wide failure that threatened the safety of an entire craft.

This lack of similar cases is not surprising, given that one of the fundamental tenets of railroad safety is to provide consistent flagging protection when men and machines are working adjacent to tracks. The B & M conceded that the failure to flag when men and machinery are working alongside tracks is extremely hazardous. The First Circuit recognized that inconsistent flagging at construction sites could result in fatal crashes

(App. 17a). Even the B & M concedes the need for and the importance of such protection.

The First Circuit was extremely careful to note that this case arose because of the B & M's failure to provide consistent flagging protection throughout its system. The conductors and trainmen who rode the passenger and freight trains through the B & M's unprotected work sites were not in a position to know of the risk until their train actually was passing through the danger zone. Only the Respondents -- their union representatives -- were privy to the system-wide nature of the inconsistent flagging and thus in a position to recognize the danger to which all their members were exposed (App. 9a). Since all their members were subject to the danger, all their members were entitled to invoke the FRSA and refuse to work under the hazardous condition of inconsistent flagging. That is what happened on November 4, 1985.

The Railroad and its *amicus*, however, ignore the crucially unique nature of these facts. They persist in labeling the Respondents' refusal to work under hazardous conditions a "strike," and accuse the First Circuit of creating a "novel strike right" (Railroad's Brief at p. 15). This is patently false. The actual holding of the First Circuit is:

> We hold that where hazardous working conditions are the result of a system-wide failure to provide adequate protection so that employees are in danger of death or

> serious injury without knowing it, and the Union is aware of such danger, the Union may call a concerted work stoppage under §10(b) to protect the lives and safety of the employees.

(App. 9a). The holding is narrowly limited to the facts of this case. It is specifically predicated on "a system-wide failure to provide adequate protection." As noted above, this is the *only* reported decision involving such a system-wide failure. It has never happened before, and probably will never happen again. It was a peculiar and unprecedented situation, but one to which the First Circuit had to respond. It did so by issuing a holding that can only be extended to an equally rare factual situation. It does *not* create a novel right to strike. It does recognize the right to call a concerted work stoppage in order to protect the lives and safety of employees only when they are confronted with what are truly extraordinary circumstances in the railroad industry. It is a ruling narrowly tailored to its unique set of facts, and will hardly unleash the parade of horribles imagined by the Railroad and its *amicus*.

What happened on November 4, 1985 was not a "general strike" or a "protest strike." It was an unprecedented FRSA refusal to work due to an unprecedented set of hazardous circumstances. There is no reason to believe that those peculiar circumstances will ever arise again. Yet the B & M and its *amicus* claim the First Circuit's opinion

will "undermine" the Railway Labor Act. Their argument does not make sense.

The B & M and its *amicus* argue that the opinion below "grants to railway labor a potent one-sided weapon" that "patently invites railroad strikes" because it holds "courts are powerless to grant any remedy to carriers." (Railroad's Brief at p. 25). This is not what the opinon holds. The First Circuit *enjoined* the Respondents from continuing the work stoppage. The Circuit Court held that the district court *did* have jurisdiction to issue an injunction pending resolution of the dispute by binding arbitration: "The injuction shall be modified so that it (1) requres the B & M to follow its stated policy of flagging at all construction sites on or near the tracks and (2) enjoins the Union from *calling a work stoppage so long as the B & M follows this policy.*" (App. 18a). This is a balanced injunctive remedy that accomodates the interests of both the employees and the Railroad. It addresses the hazardous condition while ensuring that the Railroad's trains will continue running while the dispute is resolved by binding arbitration.

Furthermore, the First Circuit specifically held that the FRSA cannot be used as a strike weapon:

> We hold that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to order injunctive relief to prevent a refusal to work by an entire work force under §10 of the

> FRSA from becoming economic combat and thereby preventing resolution of the dispute under the statutory procedures.

(App. 16a). In so holding, the First Circuit followed the teachings of this Court and accommodated "the venerable Norris-LaGuardia Act with the purpose of the recently enacted FRSA." (App. 15a). The Circuit Court deftly fashioned an injunction that protected the employees while preventing their refusal to work from becoming economic combat. *See also Gateway Coal Co.* v. *United Mine Workers of America,* 414 U.S. 368 (1974). This is hardly the "one-sided weapon" decried by the B & M and its *amicus.*

The weakness of the Railroad's "one-sided weapon" argument is further illustrated by the Railroad's response to the Respondents' refusal to work. As the Circuit Court noted (App. 11a), in retaliation for the work stoppage the B & M fired General Chairman Lenfest. It also fired most of his local Chairmen, and disciplined many of his members. Stripping a man of his job and seniority is the ultimate economic weapon wielded by a railroad, and the B & M has wielded that weapon here with a vengeance. The discipline imposed by the Railroad can only be rescinded if an arbitrator objectively determines that a life threatening safety hazard existed.

Any employee who decides to refuse to work under hazardous conditions knows that he risks his job if he is wrong. That stark fact alone is a sure guarantee the FRSA will not be used as a "one-sided weapon." This factor, combined with the First Circuit's narrow factual holding and balanced injunctive remedy, makes it difficult to conceive how the instant opinion could possibly "undermine" the Railway Labor Act.

II. This case does not present any conflict of decisions.

There is a complete absence of any conflicting opinions among the lower courts regarding the application of the Federal Railroad Safety Act, 45 U.S.C. §441 (FRSA). In the nearly seven years since the enactment of the FRSA, the instant case is the *only* reported decision concerning the Act. Simply put, there is no conflict of decisions for this Court to resolve.

A reading of the Court of Appeals' opinion reveals it is balanced and well-reasoned. But even were this Court to entertain doubts as to its soundness, is it not best to allow other lower courts the opportunity to interpret and apply the FRSA before any intervention by this Court? It may be that a conflict will never develop. And if a conflict does develop, then this Court can take advantage of the various lower court interpretations and approaches when deciding how to resolve the conflict.

The fact that the FRSA has generated only one reported decision in its seven years on the books also argues against the expenditure of this Court's scarce judicial resources at this time. The plain fact is that the FRSA does not generate litigation. It is not an area crying out for this Court's attention.

Furthermore, as discussed above, the facts of this case are unprecedented. Indeed, were it not for the unique nature of its facts, this case never would have been brought at all. There is no reason to believe the unprecedented fact pattern of this case will ever arise again. Certainly this case does not involve a recurring problem that this Court should feel compelled to address.

The Railroad and its *amicus* argue that the First Circuit's opinion runs contrary to the decision in *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Railroad Trainmen,* 342 F.2d 298 (5th Cir. 1965). The *M-K-T R.R.* case was handed down 15 years *before* the enactment of the FRSA, and only spoke of a railroad's common law duty to provide safe working conditions for its employees. Congress enacted the FRSA in 1980, thereby creating a specific scheme of statutory rights and duties superseding whatever common law rights may have existed. Obviously, the *M-K-T R.R.* case has absolutely no precedential value or effect on the construction or application of the FRSA.

The Railroad and its *amicus* also argue that the First Circuit's opinion deprives the federal courts of their power to determine the arbitrability of railroad safety disputes. It is not the First Circuit that so deprives the federal courts, it is Congress. Congress explicitly stated in the FRSA that "*Any dispute*, grievance, or claim arising under this section *shall be subject* to resolution in accordance with the procedures set forth in section 153 of this title." 45 U.S.C. §441(c) [emphasis added]. That is, *any* dispute over railroad employees' refusal to work under hazardous conditions *must* be resolved by binding arbitration. The House Report leaves no room for doubt: "The committee intends this to be the exclusive means for enforcing this section." H.R. Rep. No. 1025, 1980 U.S. Code Cong. & Adm. News at 3841. The question of arbitrability already has been decided by Congress. Any and all such railroad safety disputes must go to binding arbitration.

A refusal to work under hazardous conditions by railroad employees is not a major dispute arising out of a Section 6 notice, nor is it a minor dispute arising out of a term of the collective bargaining agreement, nor is it a *Boys Market* dispute arising out of a no-strike clause, *Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). It is a dispute arising under the FRSA, and must be resolved by binding arbitration, not the federal courts. The B & M and its *amicus* would have all federal judges become fact-finders whenever an FRSA dispute arises. Federal judges do not need this additional work, and such judicial fact-finding would defeat

the declared purpose of the FRSA: to swiftly channel *all* disputes concerning refusals to work under hazardous conditions into binding arbitration.

By asking this Court to rule that federal courts can and must make findings of fact in FRSA disputes, the B & M and its *amicus* in effect are asking this Court to judicially overrule the FRSA. If the Railroad and its *amicus* are not happy with the FRSA, their remedy lies with Congress, not with this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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